IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

FRANK C. WHITTINGTON, II,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 2291-VCP
	)	
DRAGON GROUP L.L.C.,	)	Appeal No. 392, 2009
THOMAS D. WHITTINGTON, JR.,	)	
RICHARD WHITTINGTON,	)	
L. FAITH WHITTINGTON,	)	
DOROTHY W. MINOTTI,	)	
MARNA A. McDERMOTT,	)	
SARAH I. WHITTINGTON,	)	
RUTH A. WHITTINGTON,	)	
MATTHEW D. MINOTTI, and	)	
DOROTHY A. MINOTTI,	)	
	)	
Defendants.	)	

OPINION

Submitted: October 6, 2010
Decided: April 15, 2011

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PARSONS, Vice Chancellor.

This is the most recent, and perhaps final, episode in a convoluted business dispute between Frank Whittington and his siblings. Frank has asked the Court of Chancery to determine whether he is contractually entitled to an ownership interest in a certain family-owned Delaware business, Dragon Group, L.L.C. ("Dragon Group"), and if so, what his stake in that business is.

After conducting a trial in this action, I ruled that laches prevented Frank from pursuing this claim. He appealed this decision to the Supreme Court, which ruled that the analogous statute of limitations is twenty years instead of three years, as I had held. On remand as to laches, I concluded that, when viewed in the context of a twenty-year limitations period, the evidence did not support barring Frank's claim for laches. The Supreme Court affirmed that decision and remanded this matter for consideration of Frank's claims on the merits. Defendants then filed a motion to amend their answer and counterclaim, which I denied on February 11, 2011.[1]

This Opinion reflects my post-trial findings of fact and conclusions of law on the merits of this dispute. For the reasons stated, I find that Frank is a member of Dragon Group, his ownership percentage is 18.81%, he is entitled to a judgment for damages based on two previous distributions made to other members, and he is entitled to an accounting as to Dragon Group.

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[1] *Whittington v. Dragon Gp. L.L.C.*, 2011 WL 497612 (Del. Ch. Feb. 11, 2011).

I. BACKGROUND

A. The Parties

The parties to this action are members of the Whittington family. Plaintiff, Frank C. Whittington, II,[2] seeks to compel his siblings to recognize his membership in Dragon Group, a Delaware limited liability company and nominal Defendant. The other Defendants are Frank's four siblings, Thomas D. Whittington, Jr. ("Tom"), Richard Whittington ("Richard"), L. Faith Whittington ("Faith"), and Dorothy W. Minotti ("Dorothy") (collectively, the "Sibling Defendants"), and certain members of the next generation of the Whittington family, all of whom are members of Dragon Group. Frank and the Sibling Defendants are the children of Dorothy B. Whittington ("Mrs. Whittington") and Thomas D. Whittington ("Mr. Whittington"), who are deceased.[3] Tom and Richard are managers of Dragon Group.[4]

B. Facts

1. The genesis of this dispute

This case involves a family dispute that spans over a decade. To grasp its complexity, it is helpful to have a basic understanding of the progression of the Whittington family businesses. Throughout their lives, Mr. and Mrs. Wittington owned

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[2] Because so many of the parties share the surname Whittington, I refer to them by their first names. No disrespect is intended.

[3] Pl.'s Ex. ("PX") 1 at 2.

[4] Am. Compl. ¶ 13; Ans. to Am. Compl. ¶ 13.

and operated several businesses.[5] They also gifted shares in those businesses to their children—Frank and the Sibling Defendants—and issued nonvoting stock in trust for their grandchildren.[6] Although Dragon Group is another Whittington family business, Mr. and Mrs. Whittington were never members and had no part in its creation.[7]

The first dispute between Frank and the Sibling Defendants relevant to this action, *Whittington v. The Farm Corporation*, C.A. No. 17380 (the "Farm Corp. Litigation"), involved a disagreement about ownership of the overarching family business, Whittington Ltd. ("Ltd."). The major issues in the Farm Corp. Litigation involved whether Frank owned a majority of Ltd. voting stock and whether the Sibling Defendants had breached any fiduciary duties to Ltd. There were two categories of issues regarding stock ownership, which pertained to groups of ten and fifty-five shares, respectively. The questions associated with these two groups of shares in the Farm Corp. Litigation relate to different matters than the issues in this litigation,[8] but they arise from a common nucleus of operative fact as explained in greater detail *infra*.

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5 PX 1 at 2.

6 *Id.* at 3.

7 Pretrial Stip. and Order ("PTO") 5 § 2.40.

8 As background, Frank believed that the Sibling Defendants violated Delaware law when they issued themselves ten additional Ltd. shares each. Pl.'s Pre-Trial Br. 18, *Whittington v. Farm Corp.*, C.A. No. 17380 (Del. Ch. June 7, 2001), Dkt. Item ("D.I.") 113. The fifty-five shares had been willed to Frank and were at issue only because they had yet to be distributed to him. Faith, as executrix of Mrs. Whittington's estate, had voted these shares, thereby converting certain other shares to voting stock, which diluted Frank's interest in Ltd. *Id.* at 45; Defs.' Trial

To settle the Farm Corp. Litigation and other family disputes, the parties entered into an Agreement in Principle ("AIP") on June 14, 2001.[9] The present action turns largely on the proper interpretation of the AIP. The contested paragraphs of the AIP concern Frank's acquisition of the groups of ten and fifty-five Ltd. shares. Paragraph 3 states:

> Frank gets 10 shares of Ltd. stock upon payment of $10,000 (without interest). Frank's proportionate interest in Ltd. will be carried forward into Dragon Group LLC with same rights as all other members.[10]

Paragraph 5 provides that:

> In full repayment of a $190,000 loan from Dorothy B. Whittington, Frank pays Estate $90,000 and waives his interest in his Generation Skipping Trust in favor of his four siblings; Estate releases to Trust and Trust releases to Frank 55 Ltd. shares upon payment.[11]

While Dragon Group existed at the time the parties executed the AIP,[12] Frank and the Sibling Defendants had not yet agreed on the terms of a written operating agreement for the company. Frank's refusal to implement the settlement reflected in the AIP led the

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Br. 11, *Whittington v. Farm Corp.*, C.A. No. 17380 (Del. Ch. June 7, 2001), D.I. 115.

9 *Whittington v. Dragon Gp. L.L.C.*, 2010 WL 692584, at *1 (Del. Ch. Feb. 15, 2010).

10 PX 3, the AIP.

11 *Id.*

12 Tom formed Dragon Group on March 25, 1996. PX 27; Dep. of Dragon Group 37. Until October 15, 2002, Tom was also the only member of Dragon Group. *Id.* at 95.

Sibling Defendants to file a Motion and Proposed Order to Enforce the Settlement Agreement (the "2001 Motion") in the Farm Corp. Litigation.[13] On October 11, 2001, Chancellor Chandler ruled on that motion (the "2001 Ruling"), holding that "all of the material terms that were necessary to make this a binding and enforceable agreement were set forth in the agreement in principle . . . [and] the parties, in fact, did intend to bind themselves contractually to the specific terms set forth in the agreement in principle."[14]

The 2001 Ruling also specifically addressed a dispute concerning Paragraph 11 of the AIP, which reads: "All payments set forth herein above shall be made by June 30, 2001, and appropriate documentation acceptable to all parties to accomplish same including without limitation the Certificate of Formation and Operating Agreement for Dragon Group, L.L.C." Defendants argued that the AIP was not a self-executing document and, instead, required the subsequent execution of a Dragon Group operating agreement to become effective. Chancellor Chandler rejected this argument, holding "the fact that other documents are contemplated, as this agreement in principle clearly does, cannot deprive it of being enforceable as a freestanding agreement and contract."[15] The Court further held that "If [the parties] want to go forward and negotiate a document concerning the LLC and how it's going to be managed, they can, but they don't have to.

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13 *Whittington v. Farm Corp.*, C.A. No. 17380 (Del. Ch. July 20, 2001), D.I. 121.

14 Tr. of Ruling of the Court 5, *Whittington v. Farm Corp.*, C.A. No. 17380 (Del. Ch. Oct. 11, 2001), D.I. 144 (the "2001 Ruling"); PX 29.

15 *Id.* at 10.

The rest of [the AIP] is enforceable as it stands."[16] After this ruling, it still took almost a year for the parties to begin moving toward implementing the terms of the AIP.

On September 23, 2002, Tom distributed a Memorandum (the "Offering Memorandum") to all Ltd. members offering them membership in Dragon Group based on their respective ownership interests in Ltd. To accept the offer, Ltd. members were to sign and return certain documents, including a pledge of all their Ltd. stock, to Tom by October 15, 2002. Frank substantially complied with these requirements.[17] The only deviation involved his increasing the amount of his listed ownership stake from 17.77% to 24% to reflect approximately the percentage interest in Dragon Group to which Frank believed he was entitled. On October 16, 2002, Frank's attorney delivered the two checks for $10,000 and $90,000 for the ten shares and fifty-five shares, respectively, agreed upon in the AIP, thereby concluding Frank's obligations thereunder related to those shares.

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16 *Id.* at 13.

17 While Frank never physically delivered his stock to Tom, he did sign and return the stock pledge as required by the Offering Memorandum. PX 49 at D0864. Tom testified that the Offering Memorandum did not require members to physically turn in their shares, but after the LLC documents were together, "then [Dragon Group] ask[ed] that the shares be turned in." Trial Transcript of June 10-13, 2008 ("T. Tr.") at 167. Because the Sibling Defendants excluded Frank from participation in Dragon Group, there was never a need for him to surrender his shares. In addition, at least a couple of members of the next generation of Whittingtons apparently also did not surrender their stock because they owned only relatively small amounts of it. *See id.* at 201-02; PX 34. Thus, I find that Frank did not have to actually surrender his stock to comply with the terms of the Offering Memorandum.

In November of 2002, Dragon Group informed Frank that it considered his changes to the Offering Memorandum to be a counteroffer, which it rejected. Frustrated with his sibling's decision to exclude him from Dragon Group, on December 9, 2002, Frank filed a Motion for Order Compelling Defendants' Compliance with Court Order and Directing Performance by Substitute (the "2002 Motion").[18] In the 2002 Motion, Frank asked the Court to either (1) recognize the Amendment to the Dragon Group LLC Operating Agreement that Tom prepared and Frank modified to reflect the percentage he believed was called for in the AIP, or, (2) "accept the [draft] Dragon Group LLC operating agreement which Mr. Weiner forwarded to Mr. Ferry on June 29, 2002."[19] Defendants opposed Frank's motion because, among other things, it would have given him a larger ownership interest than that to which Defendants believed he was entitled.

Vice Chancellor Lamb denied the 2002 Motion in a March 4, 2003 Letter Opinion (the "2003 Letter Opinion").[20] There, the Court held that Chancellor Chandler already had determined in the 2001 Ruling that the AIP was an enforceable contract. It, therefore, was immaterial whether Frank's alteration of the draft Limited Liability Company Agreement contained in the Offering Memorandum constituted a counteroffer because the inability of the parties to agree on subsequent documents contemplated by

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18 *Whittington v. Farm Corp.*, C.A. No. 17380 (Del. Ch. Dec. 9, 2002), D.I. 148; PX 27.

19 2002 Mot. 4.

20 *Whittington v. Farm Corp.*, C.A. No. 17380, slip op. at 4-5 (Del. Ch. Mar. 4, 2003).

the AIP did not affect its enforceability. Vice Chancellor Lamb further found that, "the settlement was concluded by the payment of monies and the exchange of certain documents, such as stock certificates," and that "there is no basis . . . for the Court to compel any party to do anything else."[21] In other words, the Court concluded that by March 2003 any further affirmative acts required by the AIP had been performed. The 2003 Letter Opinion held that the "terms of the [Dragon Group] operating agreement will be those that were established at its inception, adjusted to reflect Frank Whittington's percentage ownership interest."[22] Although the 2002 Motion asked the Court to consider other issues, Vice Chancellor Lamb expressly refused to do so because those issues were outside the scope of the matters before him.[23]

Both sides claimed victory after the issuance of the 2003 Letter Opinion. Frank believed it confirmed his membership in Dragon Group, while the Sibling Defendants thought that, because the Court denied the 2002 Motion, it effectively had blessed their exclusion of Frank from Dragon Group. In any event, Defendants consistently maintained that Frank was not a member of Dragon Group. On January 12, 2005, Dragon Group asked its members to make a capital contribution, the sum of which amounted to $36,152.[24] On November 8, 2005, Dragon Group made a $100,000

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21 *Id.* at 3-4.

22 *Id.* at 4-5.

23 *Id.* at 5.

24 PX 40 at 4.

distribution to its members.[25] Dragon Group again made a distribution to its members on September 7, 2006, this time for $600,000.[26] Dragon Group never asked Frank for a capital contribution or made any distribution to him.

Frank filed this action on July 20, 2006 to compel Defendants to recognize his membership in Dragon Group. The somewhat complicated procedural development of the case since then is described in more detail *infra* Part I.C.

2. The history of the parties' ownership in Ltd.

To address the merits of this action, it is critical to understand the respective parties' ownership rights in both Ltd. and Dragon Group. When Mr. Whittington died in September 1993, each sibling apparently owned 112 shares in Ltd. and Mrs. Whittington owned 114 Ltd. shares.[27] Following Mr. Whittington's death, all five siblings became members of the board of directors for the Whittington entities. Sometime thereafter, disagreements arose among the siblings and Frank resigned from the board.[28] Upset with his resignation, Mrs. Whittington gave a $10,000 check to each sibling and suggested they each put the money back into Ltd., lest the company go bankrupt.[29] All of the siblings reinvested the money in Ltd. except Frank. The Sibling Defendants then issued themselves ten more shares each of Ltd. stock in exchange for their respective $10,000

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25 *Id.* at 7.

26 *Id.* at 9.

27 PX 1 at 5.

28 *Id.* at 7.

29 *Id.*

investments.[30] Thus, by the end of 1994, the Sibling Defendants each possessed 122 shares of Ltd. stock, Frank possessed 112 shares, and Mrs. Whittington retained 114 shares.[31]

In 1998, the parties entered into a settlement agreement resolving a dispute regarding the ownership of shares that Mrs. Whittington allegedly had gifted to Frank's son, Frank Cole, during his lifetime, that arose after Frank Cole passed away.[32] Pursuant to the agreement, forty shares of Ltd. previously held by Mrs. Whittington were distributed as follows: twenty shares to Frank and the other twenty to the Thomas D. Whittington Residuary Trust, a trust established by Mr. Whittington's will.[33] The Residuary Trust ultimately distributed the twenty shares titled to it in equal proportion to all of the siblings.[34] The settlement agreement therefore resulted in Tom, Richard, Dorothy, and Faith each holding 126 shares of Ltd., and Frank holding 136 shares.[35] Mrs. Whittington, who retained 74 shares, died in June of 1999.[36] She bequeathed her remaining Ltd. shares as follows: 55 to Frank and 19 to Faith.

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30 PX 1 at 10.

31 See PX 5 at WB 189 for an amendment reflecting Ltd. ownership at that point in time.

32 PX 1 at 19-20.

33 *Id.* at 20.

34 T. Tr. at 338.

35 See PX 5 at WB 195 for an amendment reflecting ownership at this point in time.

36 PX 1 at 20.

There are a number of conflicting versions of draft Dragon Group operating agreements. One draft, dated March 25, 1996, reflects the Sibling Defendants holding 126 shares, Frank owning 136 shares, and Mrs. Whittington's estate holding 74 shares.[37] The Sibling Defendants contend that this document erroneously includes Mrs. Whittington's interest, as she never was, nor wished to be, a member of Dragon Group. Defendants cannot recall who prepared the document, but admit that it must have been someone associated with them.[38]

Another draft, also bearing a date of March 25, 1996 is similar except that it does not include any shares held by Mrs. Whittington.[39] A draft amendment, dated October 16, 1999, includes the forty shares that were distributed under the Settlement Agreement in the totals for Frank and the other Sibling Defendants, but again makes no mention of any shares held by Mrs. Whittington.[40] Finally, a draft second amendment to Dragon Group's operating agreement, dated June 30, 2001, includes in Frank's total the fifty-five shares willed to him by Mrs. Whittington along with the ten shares the Sibling Defendants agreed to allow Frank to purchase in the AIP.[41] This gave Frank a total of

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37 PX 5 at WB 195.

38 *See* T. Tr. at 153.

39 PX 19 at F327.

40 *Id.* at F347.

41 PX 5 at WB 201.

201 shares, or a 23.65% ownership interest in Dragon Group.[42] There is some inconsistency in the way this version of the draft amendment accounts for the willed shares. Mrs. Whittington's estate is still listed in the amendment as possessing the nineteen shares willed to Faith, while the fifty-five bequeathed to Frank were included in his total.

The Offering Memorandum Tom circulated makes no mention of Mrs. Whittington's interests in Ltd. having any relationship to Dragon Group. In addition, a draft LLC agreement attached to the Memorandum lists Frank's interest as 17.77% rather than 23.65%, reflecting an ownership of only 136 shares.[43] In signing the draft LLC agreement, Frank added an asterisk stating that the correct percentage should be around 24%, consistent with his claims in this action.

The parties continue to disagree as to the number of Frank's shares in Ltd. that carry forward into Dragon Group. Therefore, I must resolve three issues: (1) whether Frank is a member of Dragon Group, (2) Frank's percentage interest in Dragon Group, and (3) whether Frank is entitled to any relief.

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[42] This percentage results from dividing 201 by 850—the total number of Ltd. shares outstanding. There is no dispute that Ltd. has 850 shares outstanding; the dispute centers on which of these Ltd. shares should carry forward into Dragon Group.

[43] PX 21 at D0740. This percentage results from dividing 136 by 766, a total that does not include any of Frank's 10 or 55 disputed shares or Faith's 19 shares.

C. Procedural History

Frank initiated this action on July 20, 2006. He moved for summary judgment on October 25, 2006, and I denied that motion on May 8, 2007. Defendants moved for summary judgment in February 2008, which I denied in June 2008. On June 11, 2009, after a full trial, I held that Frank's claim was barred by the doctrine of laches, relying on an analogous statute of limitations of three years. On December 18, 2009, the Delaware Supreme Court held that the correct analogous limitations period was twenty years and remanded this action for reconsideration of the laches defense in view of that holding.[44] On February 15, 2010, after reconsideration, I concluded that laches did not bar Frank's claim. On July 7, 2010, the Supreme Court affirmed this decision and remanded the case for consideration of Frank's claims on the merits. In a Memorandum Opinion entered on February 11, 2011, I denied Defendants' motion to amend their counterclaims to add claims for mutual mistake, unilateral mistake, and reformation. This action, therefore, is now ripe for consideration on the merits.

D. Parties' Contentions

Frank contends he is a member of Dragon Group and asks the Court to declare him a member with a 23.65% interest, order that Dragon Group's operating agreement be amended to reflect this interest, award him damages of $216,830 plus interest based on

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[44] *Whittington v. Dragon Gp., L.L.C.*, 991 A.2d 1 (Del. 2009).

prior distributions by Dragon Group, disburse his proportionate share of Dragon Group profits, and compel an accounting of Dragon Group.[45]

The Sibling Defendants contend that Frank is not a member of Dragon Group because he did not comply with the requirements for membership. They further assert that even if Frank is a member, his ownership interest is significantly less than 23.65%. In that regard, the Sibling Defendants contend that previous drafts showing Frank's interest to be approximately 23.65% were in error, and that the parties never intended the fifty-five shares Frank received from his mother to carry forward into Dragon Group. Finally, they argue that it would be inequitable for Frank to share in past distributions to members of Dragon Group, even if he is a member.[46]

II. ANALYSIS

A. Defendants are Precluded from Arguing Frank is not a Member.

As to the Sibling Defendants' challenges to Frank's membership in Dragon Group, Frank contends those arguments are barred by the doctrines of claim and issue preclusion. According to Defendants, the AIP granted Frank only an option to join Dragon Group. They contend that to become a member he needed to comply with the terms of an

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[45] Am. Compl. 7-8; Pl.'s Op. Br. ("POB") 7-8. Similarly, Plaintiff's Reply Brief, filed on September 17, 2010, is referred to as "PRB." Moreover, Plaintiff's Post-Trial Opening and Reply Briefs and Defendants' Post-Trial Answering Brief, filed on September 12, 2008, October 30, 2008, and October 14, 2008, are referred to as "PPTOB," "PPTRB," and "DPTAB," respectively, and Defs.' Post-Remand Answering Br. on the Remaining Issues is referred to as "DAB."

[46] *See* DAB 13-14.

additional document, namely, the Offering Memorandum, which he failed to do. An analysis of both the 2001 Ruling and the 2003 Letter Opinion in the earlier Farm Corp. Litigation, however, shows that the Court already has decided in Frank's favor the issues that underlie the Sibling Defendants' arguments for denying him membership in Dragon Group.

Often confused, claim preclusion (also known as *res judicata*) and issue preclusion (also known as collateral estoppel) are related doctrines of judicial efficiency.[47] The doctrines operate to thwart multiplicitous litigation by limiting parties to one trial on a cause of action or issue. Claim preclusion prevents re-litigation where:

> (1) the original court had jurisdiction over the subject matter and the parties; (2) the parties to the original action were the same as those parties, or in privity, in the case at bar; (3) the original cause of action or the issue[] decided was the same as the case at bar; (4) the issues in the prior action must have been decided adversely to [the party opposing preclusion] in the case at bar; and (5) the decree in the prior action was a final decree.[48]

Furthermore, claim preclusion applies not only to those claims that were raised and decided in earlier litigation, but also to claims that could have been raised and decided.[49] Comparatively, issue preclusion prevents a party from relitigating matters of fact that "were, or necessarily must have been, determined" in a prior action.[50] Issue

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47 *See Columbia Cas. Co. v. Playtex FP, Inc.*, 584 A.2d 1214, 1216 (Del. 1991).

48 *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 192 (Del. 2009).

49 *Id.* at 191-92.

50 *Sanders v. Malik,* 711 A.2d 32, 33 (Del. 1998).

preclusion applies if: (1) the same issue is presented in both actions; (2) the issue was litigated and decided in the first action; and (3) the determination was essential to the prior judgment.[51]

As recounted in the Statement of Facts, the 2001 Ruling held that the AIP is an enforceable contract, notwithstanding the fact that the parties were unable to agree on a written operating agreement for Dragon Group. Claim preclusion thus prevents any argument based on the premise that additional documentation regarding Dragon Group or action beyond what is prescribed in the AIP was necessary for Frank to become a member. The AIP clearly contemplates that Frank would become a member of Dragon at some level of ownership without further action on his part. The only question that might arise under the AIP would be what the extent of his ownership would be. Thus, Defendants' claim that the AIP presented Frank with an option to join Dragon Group that could be exercised only upon compliance with the Offering Memorandum cannot stand.

An examination of the remaining elements for claim preclusion further supports its application here. First, there is no question that this Court had jurisdiction over the Farm Corp. Litigation. Second, the parties to this action are the same as, or in privity with, the parties to the Farm Corp. Litigation.[52] The Sibling Defendants participated in both

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51 *Id.* at 33-34.

52 Privity is found where a legal relationship exists between a nonparty and a named party, or where, even though the nonparty falls short of becoming a named party, principles of justice dictate that it should be denied the opportunity to relitigate matters previously in issue. *Kohls v. Kenetech Corp.*, 791 A.2d 763, 769 (Del. Ch. 2000), *aff'd*, 794 A.2d 1160 (Del. 2002).

actions. Furthermore, the concept of privity supports extending preclusion from them to both Dragon Group and the next generation defendants. The Sibling Defendants constitute the board of directors and management of Dragon Group. Presumably, they considered Dragon Group's interests when negotiating the AIP, especially given Paragraph 3's direct reference to Dragon Group. Finally, principles of justice dictate that the members of the next generation also should be precluded from relitigating these issues as they were members of Dragon Group by the time of the 2003 Letter Ruling. Allowing them to relitigate these issues would further prolong this unduly protracted action and could lead to inconsistent or conflicting results. As to the fourth element, the 2001 Ruling was adverse to the Sibling Defendants' contention that the AIP required execution of subsequent documents. As to the fifth element, "[a] final judgment is generally defined as one that determines the merits of the controversy or defines the rights of the parties and leaves nothing for future determination or consideration."[53] The 2001 Ruling qualifies as a final decree as to the AIP's enforceability without any need for subsequent documentation because, after hearing the merits of the controversy, the Chancellor unequivocally ruled that "this agreement is enforceable as it stands" and left nothing open for further consideration.[54] Thus, claim preclusion bars any argument that the AIP required further documentation or performance for Frank to become a member of Dragon Group.

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53 *Tyson Foods, Inc. v. Aetos Corp.*, 809 A.2d 575, 579 (Del. 2002).

54 2001 Ruling 13.

Examination of the later 2003 Letter Opinion reinforces the conclusion that Frank is a member. In that Opinion, Vice Chancellor Lamb recognized that Chancellor Chandler's 2001 Ruling held that the AIP was valid and enforceable on its own. The Letter Opinion then went a step further and held that all of the aspects of the AIP that required affirmative actions were satisfied. This means that to the extent certain paragraphs of the AIP required performance of specific actions, the Court found that those actions had been taken by the time of the 2003 Letter Opinion. For example, Paragraph 3 states, in part, that: "Frank gets 10 shares of Ltd. stock upon payment of $10,000 without interest."[55] The Court held that Frank had satisfied that payment requirement.

The 2003 Letter Opinion also reaffirmed that Frank has become a member of Dragon Group. Vice Chancellor Lamb reiterated this conclusion when he stated, "The terms of the [Dragon Group] operating agreement will be those that were established at its inception, adjusted to reflect Frank Whittington's percentage ownership therein."[56]

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55 AIP ¶ 3 (emphasis added).

56 *Whittington v. Farm Corp.*, C.A. No. 17380, slip op. at 4-5 (Del. Ch. Mar. 4, 2003). The bracketed inclusion of Dragon Group replaces the Court's actual words, which were "Frog Hollow." Defendants contend that Vice Chancellor Lamb intentionally referred to Frog Hollow, and thus the Letter Opinion does not apply to Dragon Group. In my June 6, 2008 opinion in this case, however, I concluded that the statement merely was an oversight because "nothing in the underlying motion would support a reference to Frog Hollow LLC in that context." *Whittington v. Dragon Gp.*, 2008 WL 4419075, at *2 n.11 (Del. Ch. June 6, 2008). That decision constitutes the law of the case, and I, therefore, decline to revisit the question. *See Taylor v. Jones*, 2006 WL 1510437, at *5 (Del. Ch. May 25, 2006) ("The 'law of the case' doctrine requires that issues already decided by the same court should be adopted without relitigation, and once a

Contrary to the Sibling Defendants' assertion, whether Frank's alteration of the percentages on the proposed LLC Agreement attached to the Offering Memorandum, an ancillary document to the AIP, constituted a counteroffer is irrelevant. Performance of the AIP's terms was all that was necessary for Frank to perfect his interest in the ten shares and fifty-five shares of Ltd. he acquired pursuant to the AIP. Vice Chancellor Lamb held that, by the time of the 2003 Letter Opinion, Frank had complied with those requirements. Moreover, all five of the elements of claim preclusion arguably are fulfilled here, as described above, and Vice Chancellor Lamb's holding that "those aspects of the Agreement in Principle that required affirmative acts were satisfied" can be considered final and binding on Defendants. Even if the 2001 Ruling and the 2003 Letter Opinion did not satisfy the elements for claim preclusion, they at least provide a basis for issue preclusion. First, the issue as to Frank's membership in Dragon Group presented in this action is identical to the one before the Chancellor and Vice Chancellor in the Farm Corp. Litigation. Just as in this action, Frank's complaint in the Farm Corp. Litigation asked the Court to declare him a member of Dragon Group.[57] As in this case, Defendants responded with their argument that the parties were unable to reach agreement on an operating agreement, and thus, Frank was not a member. The parties briefed the merits of that contention, and as described above, the Chancellor held the AIP was enforceable,

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> matter has been addressed in a procedurally appropriate way by a court, it is generally held to be the law of that case and will not be disturbed by that court unless compelling reason to do so appears.") (internal citations omitted).

[57] Verified Compl. for Decl. and Injunctive Relief 1.

and Vice Chancellor Lamb later recognized the conclusive nature of that decision.[58] Thus, this issue was litigated and decided and was essential to the resolution of the Farm Corp. Litigation.

Frank's member status in Dragon Group also was, and is, essential to the resolution of the issues currently before this Court. Moreover, as I held in my June 6, 2008 decision, "To the extent there was any confusion regarding Vice Chancellor Lamb's [decision], the parties could have sought clarification from the court. Defendants apparently made a tactical decision not to seek clarification . . . ."[59] Thus, because this Court already decided that Frank is a member of Dragon Group in the Farm Corp. Litigation and that holding is binding on Defendants, they are precluded from arguing here that Frank is not a member.

B. What is Frank's Membership Interest in Dragon Group?

Having concluded that Frank is a member of Dragon Group, I next turn to the question of his ownership percentage.

1. Defendants are not precluded from litigating this issue.

Frank contends that Defendants also are precluded from arguing that he has less than the 23.65% interest he claims because Defendants could have argued either in their 2001 Motion or their response to Frank's 2002 Motion that his interest would be less than

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[58] 2001 Ruling 13; 2003 Letter Op. 4-5.

[59] *Whittington v. Dragon Gp.*, 2008 WL 4419075, at *2 n.11 (Del. Ch. June 6, 2008).

that.[60] Claim preclusion does not apply here, however, because no final judgment was ever entered on the issue of Frank's percentage ownership in the Farm Corp. Litigation. Whether issue preclusion applies depends on whether either of the earlier rulings in that litigation actually decided Frank's percentage interest in Dragon Group.

The Sibling Defendants did not raise the issue of percentage ownership in connection with the 2001 Motion. Rather, that motion focused on whether the AIP required execution of a separate operating agreement for Dragon Group. Therefore, the 2001 Ruling did not address Frank's ownership percentage.

Frank's 2002 Motion also raised the question of the enforceability of the AIP, but it posed a number of additional issues as well. Specifically, Frank asked the Court to declare that one of two specific drafts of the Dragon Group operating agreement, both of which indicated he had a 23.65% interest, was the operative document governing Dragon Group.[61] The Sibling Defendants responded that the drafts of the Dragon Group operating agreement had no impact on the enforceability of the AIP or compliance with it pursuant the 2001 Ruling and resisted Frank's claims by asserting that the parties created the drafts he referred to in the process of negotiating an operating agreement for Dragon

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[60] Frank bases his claim to 23.65% of Dragon Group on the aggregate of the 136 shares of Ltd. he owned before the AIP and the 10 and 55 shares he acquired under the AIP. According to Frank, all of those shares carried forward into Dragon Group. Defendants deny that the additional 10 and 55 shares Frank acquired in Ltd. carried forward into Dragon Group.

[61] *See* the 2002 Motion, *Whittington v. Farm Corp.*, C.A. No. 17380 (Del. Ch. Dec. 9, 2002), D.I. 148; PX 27.

Group.[62] As discussed *supra*, in the 2003 Letter Opinion, Vice Chancellor Lamb reaffirmed the enforceability of the AIP and held that "those aspects of the AIP that required affirmative acts were satisfied." The Court also noted that Frank's 2002 Motion raised issues that were outside the scope of the Farm Corp. Litigation. For example, the 2003 Letter Opinion stated:

> By his motion, Frank Whittington invites the court to resolve the differences among the parties over [a form of operating agreement]. However, it is plain from a reading of the [2001 Ruling] enforcing the Agreement in Principle that, if the parties were unable to come to terms on a form of LLC operating agreement . . . there simply would not be a new LLC agreement . . . .[63]

The Court further stated that: "In some other respects, the Motion seeks to inject into this proceeding matters that were not part of the trial . . . ."[64]

Having carefully reviewed the 2003 Letter Opinion, I conclude that the Court decided only that the AIP was enforceable and that the affirmative steps it required had been performed. The Vice Chancellor's express refusal to consider other issues convinces me that he did not decide any dispute as to Frank's ownership percentage in Dragon Group. Thus, the doctrine of issue preclusion as it relates to the 2003 Letter Opinion does not bar Defendants from litigating the degree of Frank's ownership in this case.

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62 Defs.' Resp. in Opp'n to the 2002 Motion 8–9, *Whittington v. Farm Corp.*, C.A. No. 17380 (Del. Ch. Feb. 10, 2003), D.I. 154; PX 29.

63 2003 Letter Op. 4.

64 *Id.* at 5.

2. Judicial estoppel does not bar Defendants from contesting Frank's claimed 23.65% interest.

In addition to claim and issue preclusion, Frank argues that judicial estoppel prevents Defendants from denying his 23.65% interest in Dragon Group. Frank asserts that, because Defendants made representations in their response to the 2002 Motion that Frank's membership would be based on all of the 201 Ltd. shares he owned, they are judicially estopped from contending otherwise now.

"[U]nder the doctrine of judicial estoppel, a party may be precluded from asserting in a legal proceeding a position inconsistent with a position previously taken by him in the same or in an earlier legal proceeding."[65] The doctrine of judicial estoppel exists "to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment."[66] The Supreme Court identified several factors that courts may look to in determining whether judicial estoppel applies:

> First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. . . . A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment if not estopped.[67]

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65 *Capaldi v. Richards*, 2006 WL 3742603, at *2 (Del. Ch. Dec. 8, 2006).

66 *Id.*

67 *New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001).

Lastly, the prior court also must have relied upon the statement in making its ruling.[68]

In support of his argument that the Sibling Defendants impermissibly have taken a contradictory position in this litigation, Frank points to the Defendants' response to the 2002 Motion. There, Defendants represented to Vice Chancellor Lamb that, "[o]nce Plaintiff's desire to participate in [Dragon Group] was confirmed by his execution of the signed LLC agreement, an additional amendment was contemplated to reflect the additional shareholdings of Plaintiff (65 shares) and corresponding membership in [Dragon Group] (23.65%) . . . ."[69] This statement is inconsistent with Defendants' current argument that Frank's ownership interest is less than 23.65%. The question is whether the circumstances require that Defendants be estopped from making their current argument.

Preliminarily, I note that the issue before me involves the proper interpretation of the AIP. The specific terms of the various drafts of a Dragon Group operating agreement that were circulated among the parties are of only secondary importance. The statement by Defendants that allegedly gives rise to judicial estoppel here related not to the AIP directly, but to what the parties expected to happen pursuant to their negotiations regarding the draft operating agreement. In that sense, the materiality of the contradictory statement is questionable. That is, statements by the Sibling Defendants in relation to negotiations regarding the operating agreement are less important in the

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68 *Motorola, Inc. v. Amkor Tech., Inc.*, 958 A.2d 852, 860 (Del. 2008).

69 Defs.' Resp. in Opp'n to 2002 Motion 9, *Whittington v. Farm Corp.*, C.A. No. 17380 (Del. Ch. Feb. 10, 2003), D.I. 154.

interpretation of the AIP than the language of the AIP itself. In any event, for judicial estoppel to apply the contradictory statement must have been accepted by the court in the earlier action and relied upon by it in reaching its decision. That requirement has not been met in this case. In the 2003 Letter Opinion, the Court held that Frank satisfied all of the terms of the AIP that required further action, but made no determination as to Frank's ownership percentage in Dragon Group. Whether Frank's membership is ultimately 17.75%, 18.81%, or 23.65% does not appear to have had any bearing on the Court's ruling. Finally, Frank has not shown that Defendants gained a particular benefit as a result of making the statement in question or that it has caused Defendants to receive an unfair advantage or imposed an unfair detriment on Frank.

The key issue before me is whether, under the AIP, Frank is entitled to an ownership interest of 23.65%. Resolving this issue will require interpretation of the AIP. Based on the rulings in the Farm Corp. Litigation, what the parties tentatively may have agreed to in the course of their unsuccessful negotiations regarding a Dragon Group operating agreement is largely irrelevant to the construction of the AIP. Such extrinsic evidence would be admissible only if the Court finds that the AIP is ambiguous, and, even then, would be entitled to limited weight.

3. How many of Frank's Ltd. shares carry forward into Dragon Group?

Having concluded that Frank is a member of Dragon Group and that Defendants are not precluded or estopped from arguing Frank's percentage is less than 23.65%, the final question regarding ownership is what percentage stake Frank is entitled to in Dragon Group. Defendants assert that even if Frank is a member of Dragon Group, his

ownership stake is, at most, 17.75%. Because Frank effectively acquired his 201 Ltd. shares in separate groups of 136, 10, and 55 shares at different times and under different circumstances, resolving this question requires looking at each of these three groups separately.

As recounted in the statement of facts, the parties agree that Frank owned at least 136 shares of Ltd. stock when they executed the AIP. This total includes the 112 shares that all the siblings had been gifted, the 20 shares Frank received from the estate settlement, and the 4 shares he received on par with the Sibling Defendants from Mr. Whittington's trust. There is also no dispute that these shares are to be part of Frank's ownership in Dragon Group. If this were the full extent of Frank's interest, he would own 17.75%,[70] as Defendants contend. Frank asserts that the groups of 10 and 55 shares referenced in the AIP also should carry forward into Dragon Group, but Defendants dispute both of these contentions. They aver that these two groups should not carry forward because Frank failed to pay for them in accordance with the timetable Tom specified in the Offering Memorandum and, in the case of the fifty-five shares, because the AIP does not contemplate those shares carrying forward.

Resolution of these disputes requires interpretation of the AIP. Specifically at issue are Paragraphs three and five, which relate, respectively, to the groups of ten shares

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[70] This percentage results from dividing Frank's 136 shares by the total number of Ltd. shares carried forward into Dragon Group, in this scenario 766 shares. The 766 share total is reached by adding Frank's 136 share interest with the other members' interests of 630 shares; it does not include the 74 shares that were held by Mrs. Whittington's Estate or the 10 shares to be issued to Frank under Paragraph 3 of the AIP.

and fifty-five shares that Frank acquired. Delaware courts interpret contracts using the "objective theory," meaning contracts are given the interpretation that an objective, reasonable third-party would assign to them.[71] When contract terms are unambiguous, they are given their plain meaning.[72] Disagreement between the parties does not render a contract ambiguous; rather, to be ambiguous, the terms must be reasonably susceptible to more than one meaning.[73]

Contracts must be read as a whole to ensure each section is consistent with the remainder of the contract.[74] "Thus, a court must interpret contractual provisions in a manner that would give effect to every term of the instrument and reconcile all provisions of the instrument when read as a whole."[75] A first step in contract interpretation often is deciding whether a disputed term is ambiguous, or susceptible to more than one meaning. If the contract is ambiguous, the court may use outside or extrinsic evidence to discern the parties' intentions.[76]

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71 *NBC Universal, Inc. v. Paxson Commc'ns Corp.*, 2005 WL 1038997, at *5 (Del. Ch. Apr. 29, 2005).

72 *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co*., 616 A.2d 1192, 1195 (Del. 1992).

73 *Id*.

74 *Energy P'rs Ltd. v. Stone Energy Corp.*, 2006 WL 2947483, at *13 (Del. Ch. Oct. 11, 2006).

75 *Id.*

76 *Id.*

I also note that determining Frank's percentage interest in Dragon Group requires two steps. First, I must determine the number of Frank's Ltd. shares that the parties intended to carry forward into Dragon Group. Second, I must calculate the total number of Ltd. shares that effectively would have been carried forward into Dragon Group. Frank's percentage interest then will be the quotient of his shares and the total number of shares.

a. The ten shares Frank purchased should be carried forward

I first address whether the ten shares Frank purchased in October of 2002 should be included in his Dragon Group ownership stake. Frank purchased those shares in accordance with the AIP by making the $10,000 payment on October 16, 2002. Defendants contend that because Frank missed the October 15 deadline set forth in the Offering Memorandum, these shares cannot move forward into Dragon Group. I reject that argument, however, because the AIP, not the Offering Memorandum, is the operative document for determining Frank's ownership interest and it imposes no such time limitation.

Paragraph 3 of the AIP covers Frank's purchase of these shares. It states: "Frank gets 10 shares of Ltd. stock upon payment of $10,000 (without interest). Frank's proportionate interest in Ltd. will be carried forward into Dragon Group LLC with same rights as all other members." This language is unambiguous: Frank was to get ten shares upon payment of $10,000. In the 2003 Letter Opinion, Vice Chancellor Lamb found that this requirement had been satisfied and there was no reason "to compel any party to do

anything else."[77] The Court thereby determined one of the same issues presented here and the resolution of that issue appears to have been essential to Vice Chancellor Lamb's determination. Thus, issue preclusion bars the Sibling Defendants from relitigating here whether Frank properly purchased the ten shares referenced in Paragraph 3. Accordingly, I hold that Frank has shown that he acquired title to those additional ten shares by the time of the 2003 Letter Opinion.

The Sibling Defendants did not advance any argument other than Frank's alleged failure to comply with the October 15, 2002 deadline under the Offering Memorandum to prevent him from including these additional ten shares in computing his ownership interest in Dragon Group. Furthermore, Paragraph 3 of the AIP unambiguously indicates that if Frank acquired those additional shares in the manner indicated, they would "be carried forward into Dragon Group LLC with the same rights as all other members." There is nothing ambiguous about this provision or its application to the ten shares. Therefore, I conclude that Frank did acquire the additional ten shares of Ltd. referred to in Paragraph 3, and those shares carried forward into his ownership interest in Dragon Group.

b. The fifty-five shares do not carry forward.

I next consider whether the fifty-five shares willed to Frank by Mrs. Whittington and dispersed to him pursuant to Paragraph 5 of the AIP carry forward into Dragon Group. Frank made the $90,000 payment required by the AIP to obtain the shares on

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[77] 2003 Letter Op. at 3–4.

October 16, 2002. Like the issue of the acquisition of the ten shares described above, the 2003 Letter Opinion decided that Frank fulfilled the obligations required of him by Paragraph 5; execution of any ancillary documentation such as a waiver was unnecessary. Thus, Frank lawfully owns those fifty-five shares of Ltd., and any argument that the distribution of the shares was improper because he did not comply with the Offering Memorandum is precluded. The question remains, however, whether the parties to the AIP intended those fifty-five Ltd. shares to carry forward into Dragon Group.

Paragraph 5 of the AIP states: "In full repayment of a $190,000 loan from Dorothy B. Whittington, Frank pays Estate $90,000 and waives his interest in his Generation Skipping Trust in favor of his four siblings; Estate releases to Trust and Trust releases to Frank 55 Ltd. shares upon payment." Noticeably missing from this paragraph in comparison to Paragraph 3, which dealt with the ten shares to be conveyed to Frank, is the sentence stating that, "Frank's proportionate interest in Ltd. will be carried forward into Dragon Group LLC . . . ."[78] All that Paragraph 5 states is that in exchange for Frank's waiver of his interest in the Generation Skipping Trust and payment of $90,000 to the estate of Mrs. Whittington, the $190,000 loan Frank received from Mrs. Whittington would be satisfied and Frank would receive 55 shares of Ltd. stock. The paragraph does not reference Dragon Group and provides no indication as to whether the 55 shares were to be included in the calculation of Frank's ownership interest in it.

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[78] AIP ¶ 3.

The parties attach different meanings to Paragraph 5. The Sibling Defendants contend that the only reasonable interpretation of it is that the shares do not carry forward because there is no similar language to Paragraph 3. In contrast, Frank argues that when the parties executed the AIP they intended that the 55 shares would carry forward consistent with the second sentence of Paragraph 3. I am persuaded that Paragraph 5 is susceptible to more than one reasonable interpretation as to whether the shares bequeathed to Frank were to be carried forward into Dragon Group. Therefore, this provision is ambiguous, and I have considered extrinsic evidence in my effort to determine the intentions of the parties.

Negotiation of the AIP took place after several days of trial regarding the circumstances under which Frank would receive the fifty-five shares.[79] The parties negotiated the terms of the AIP based, in part, on a draft Settlement Term Sheet (the "Schiltz Letter") dated March 21, 2001, proposed by Frank's then attorney, Todd Schiltz.[80] While none of the terms of the Schiltz Letter made it into the AIP word for word, the AIP specifically references certain aspects of the letter in Paragraph 10. That paragraph states: "Frank, and other members, will receive periodic financial and operating information for Ltd., Frog Hollow and Dragon Group as outlined in items 22 and 23 of the March 21, 2001 letter of Todd C. Schiltz." Notably, item 21 of the Schiltz Letter, which was not incorporated into the AIP in the same terms, provided that: "Frank

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79 T. Tr. at 228.

80 PX 3.

will become a member of Dragon Group. His interest in Dragon Group will be based on his current ownership interest in Whittington Ltd. as well as the shares he is entitled to receive under this term sheet."[81]

The Sibling Defendants contend that item 21 of the Schiltz Letter shows that the parties knew how to include language that would result in the carryover of the fifty-five shares, if that had been their intent.[82] Moreover, they assert that the inclusion of references to specifications from the Schiltz Letter in the AIP's Paragraph 10 supports a reasonable inference that the absence of item 21 in the AIP means that the parties consciously considered the effect of that term and chose to leave it out. The Sibling Defendants next point to the difference in language between Paragraphs 3 and 5 of the AIP. Paragraph 3 contains a specific carryover provision, while Paragraph 5 does not. According to Defendants, the differences in language between (1) the Schiltz Letter and the AIP and (2) Paragraphs 3 and 5 were deliberate and reflect an intent that Frank's additional fifty-five shares of Ltd. not carry forward into Dragon Group.

Frank counters that the absence in Paragraph 5 of carry forward language similar to that in the Schiltz Letter does not mean it was not understood to be included. Frank asserts that everyone knew he was the beneficial owner of the fifty-five shares of Ltd. stock when the AIP was negotiated and, therefore, they implicitly were to be included in

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81 *Id.* Under the terms proposed in the Schiltz letter, Frank would have been entitled to receive both the ten and the fifty-five shares previously discussed.

82 DAPTB at 44.

his proportionate interest that was to move forward into Dragon Group pursuant Paragraph 3.

The Sibling Defendants undoubtedly knew about Frank's prospective interest in fifty-five additional Ltd. shares when the AIP was negotiated. As to whether the parties intended those shares to carry forward into Dragon Group, however, I find that Frank has failed to prove that they did. The absence of an all-encompassing provision in the AIP corresponding to item 21 of the Schiltz Letter supports this conclusion. As the Schiltz Letter shows, the attorneys for the parties easily could have included language in the AIP that clearly provided for such a carryover. The fact that they did not implies that the parties did not agree that the shares should carry forward.

In addition, the Sibling Defendants assert that the purpose of Paragraph 5 was to settle issues that revolved around Mrs. Whittington's estate and had nothing to do with Dragon Group. They also emphasize that the fifty-five shares bequeathed to Frank were part of a seventy-four share allotment that remained in Mrs. Whittington's estate. Several witnesses testified that Mrs. Whittington did not want any ownership interest in Dragon Group.[83] In that regard, Defendants further contend that the parties never contemplated that either the nineteen shares willed to Faith or those devised to Frank would be carried forward into Dragon Group. For his part, Frank dismisses as irrelevant the fact that Mrs.

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[83] T. Tr. at 85 (J.S. Green), 337 (J.M. Weiner), 415 (Tom), 656-57 (Frank).

Whittington may not have wanted to participate in Dragon Group because no stock restrictions prevented him from doing so.[84]

In response to Frank's argument, Defendants adduced evidence that they intended, when they signed the AIP, to operate Dragon Group with parity among the siblings.[85] Defendants' actions, including their post-AIP treatment of the shares bequeathed to Faith, comport with this rationale. While Faith chose to participate in Dragon Group to the extent of her pre-existing interest in Ltd., she testified credibly that she did not believe the shares bequeathed to her (and likewise those bequeathed to Frank) were eligible for inclusion.

In opposition to Defendants' position, Frank produced some evidence, such as early versions of the operating agreement and Defendants' statements to the Court in the Farm Corp. Litigation on the motion that led to the 2003 Letter Opinion, which supports a contrary inference that the parties did intend the fifty-five shares to carry forward. As Plaintiff, however, Frank bears the burden of persuasion on this issue and, because he essentially seeks specific performance of the AIP, he must prove his claim by clear and convincing evidence.[86]

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84 Defs.' Ex. ("DX") 10-11; POB at 6.

85 Defendants' counsel James Green testified that the purpose of allowing Frank to purchase the ten shares was to restore the equality among the siblings that had been destroyed when Frank was the only sibling who elected not to reinvest the $10,000 his mother gave to him. *See* T. Tr. at 67. Tom also testified that parties sought parity in ownership among the siblings. *Id.* at 152.

86 *See Osborn v. Kemp*, 2009 WL 2586783, at * 4 (Del. Ch. Aug. 20, 2009); *In re IBP, S'holders Litig.*, 789 A.2d 14 (Del. Ch. 2001).

Ultimately, Frank failed to prove by either clear and convincing evidence, or even a preponderance of the evidence, that the parties intended Frank's acquisition of the fifty-five shares to carry forward and be reflected in his ownership interest in Dragon Group. Although the parties knew how to include specific language in the AIP allowing those shares to carry forward, they did not do so regarding the shares willed to Frank. Therefore, the fifty-five shares willed to Frank will not be included in his ownership stake in Dragon Group.

In summary, after carefully reviewing the evidence as to all of Frank's 201 Ltd. shares, I hold that only 146 of these shares will carry forward into Dragon Group. Therefore, Frank's ownership stake in Dragon Group is approximately 18.81%.[87]

C. Remedies

In addition to declaring him a member of Dragon Group and determining his interest in the LLC, Frank asks that the Court compel Dragon Group to disburse to him his appropriate share of past distributions and profits with interest. The parties agree that Dragon Group has made at least two distributions to its members based on their respective ownership interests, exclusive of any interest claimed by Frank. Frank seeks an award of money damages to reimburse him for his proportional share of those distributions. In addition, Frank seeks an accounting to identify any other distributions

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87 This calculation assumes Dragon Group has a total of 776 shares. This number equates to the last number of total shares with which the Court was presented and corresponds to the total number of outstanding shares of Ltd. (850) minus the 74 shares from Mrs. Whittington's estate which do not carry forward (Frank's 55 shares and Faith's 19 shares).

that may have been made since October 2002, and to determine the current financial condition of Dragon Group. The accounting should also show whether any capital contributions were made by the members of Dragon Group other than Frank. If so, Frank will be responsible to make similar contributions consistent with his ownership interest.

It is undisputed that a $100,000 distribution took place on November 8, 2005, and a $600,000 distribution occurred on September 7, 2006.[88] Because Frank had a right to an 18.81% ownership interest in Dragon Group since October 2002, he is entitled to his proportionate share of each of these distributions. The parties disagree, however, as to how the Court should compute that share. Under one proposed methodology, Frank urges the Court to find that the owners of Dragon Group other than Frank received the equivalent of $1,231.68 and $7,390.07 for each percentage point of their ownership in 2005 and 2006, respectively.[89] Frank then argues that he should receive a distribution of 18.81 times each of those amounts. Defendants object to that approach, arguing that it will result in an effective dividend from Dragon Group for each of the two relevant dates materially in excess of the dividend the board actually approved. Instead, Defendants urge the Court to declare that Frank is entitled to his proportionate share (18.81%) of the

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88 *See* PX 40 at 7, 9.

89 Frank calculated these amounts by subtracting his 18.81% interest from 100% of possible interest in Dragon Group, which equals 81.19%. This 81.19% represents the total percentage of Dragon Group owned by the owners other than Frank combined. All but one of those owners are Defendants. By dividing the $100,000 and $600,000 distributions by 81.19, Frank determined the amount Defendants received for each percentage point of interest they owned at the time of the distributions.

$100,000 and $600,000 distributions, respectively. As Frank points out, however, this method could require Dragon Group to claw back from each Defendant (and, perhaps, the members of the next generation) the excess amount it mistakenly paid them. Such a process could present logistical difficulties and, to the extent it was unsuccessful, undermine the likelihood that Frank would be made whole.

This Court, as a court of equity, has broad discretion to form an appropriate remedy for a particular wrong.[90] Given the substantial degree of acrimony among the parties involved in this case and previous cases, I conclude that the best solution is to grant a judgment against Dragon Group according to Frank's approach. This remedy, in theory, will allow Frank to collect his entire judgment from one party, Dragon Group, as opposed to having to execute against each of the Defendants. Therefore, I hold that Frank is entitled to a total of $162,175.10 from Dragon Group.[91] While collection from Dragon Group would be the preferred outcome, the possibility exists that Frank will be

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90 *See McGovern v. Gen. Hldg, Inc.*, 2006 WL 1468850, at *24 (Del. Ch. May 18, 2006) ("The Supreme Court has emphasized the capacious remedial discretion of this court to address inequity."); *Int'l Telecharge, Inc. v. Bomarko, Inc.*, 766 A.2d 437, 440 (Del. 2000) ("In determining damages, the powers of the Court of Chancery are very broad in fashioning equitable and monetary relief . . . as may be appropriate . . . ."); *Gilliland v. Motorola, Inc.*, 873 A.2d 305, 312 (Del. Ch. 2005) (quoting *Cantor Fitzgerald, L.P. v. Cantor*, 2001 WL 536911, at *3 (Del. Ch. May 11, 2001)) ("[T]his court will use its 'broad discretion to tailor [a remedy] to suit the situation as it exists.'").

91 Essentially, the $700,000 of undisputed distributions paid to the other Dragon Group members represented only 81.19% of the distributions that should have been made had Frank been paid his share on the same basis. If Frank had been paid his 18.81% interest, the total combined amount of the distributions would have been $700,000/0.8119 = $862,175.10. Therefore, Frank is entitled to 18.81% of this amount, or $162,175.10.

unable to collect from Dragon Group (due, for example, to any undisclosed insolvency or liquidity problems). To ameliorate that risk, I will enter judgment not only against Dragon Group, but also jointly and severally against the remaining Defendants, provided that no Defendant shall be liable for more than the total proportionate amount he or she would have been overpaid plus interest.[92] The potential liabilities of each of the individual Defendants are indicated in the table below.[93] In all events, however, the maximum principal amount Frank can recover will be $162,175.10.

Additionally, Frank requests prejudgment interest on any amounts due to him. Delaware law generally holds that a successful plaintiff may be awarded prejudgment interest as a matter of right.[94] This right is not self-executing, however. For the court to

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92 In the event that Dragon Group has insufficient funds to make the required payment, each member would have been overpaid by (($862,175.14/$700,000)-1), or 23.17%. Therefore, each Defendant's maximum liability equals the product of multiplying his or her aggregate distribution by 23.17%.

93 The distributions Dragon Group made to each individual defendant are shown in the following table. The amount in the "Amount Liable" column shows the maximum principal amount for which each Defendant is personally liable. *See* PX 40 at 7-9.

Defendants	2005 Distribution	2006 Distribution	Total	Amount Liable
Thomas D. Whittington Jr.	$21,587.00	$129,522.00	$151,109.00	$ 35,008.75
Richard F. Whittington	$23,175.00	$139,050.00	$162,225.00	$ 37,584.09
Dorothy W. Minotti	$20,000.00	$120,000.00	$140,000.00	$ 32,435.03
L. Faith Whittington	$20,000.00	$120,000.00	$140,000.00	$ 32,435.03
Marna A. McDermott	$ 3,175.00	$ 19,050.00	$ 22,225.00	$ 5,149.06
Sarah I. Whittington	$ 3,175.00	$ 19,050.00	$ 22,225.00	$ 5,149.06
Ruth A. Whittington	$ 1,587.00	$ 9,522.00	$ 11,109.00	$ 2,573.72
Matthew D. Minotti	$ 3,175.00	$ 19,050.00	$ 22,225.00	$ 5,149.06
Dorothy A. Minotti	$ 3,175.00	$ 19,050.00	$ 22,225.00	$ 5,149.06

94 *All Pro Maids, Inc. v. Layton*, 2005 WL 82689, at *1 (Del. Ch. Jan. 11, 2005); *Citadel Hldg. Corp. v. Roven*, 603 A.2d 818, 826 (Del. 1992).

grant prejudgment interest, the plaintiff must ask for it by way of at least a general allegation of damages in an amount sufficient to cover actual damages plus interest.[95] The Court also is entitled to grant such relief "as the facts of a particular case may dictate."[96] As part of its discretion to fashion an appropriate remedy, this Court has the discretion to award either compound or simple interest.[97] Frank requested interest in his Amended Complaint and his opening brief on the remaining issues in the case after the second remand. [98] Neither of those submissions, however, discuss what that interest should be or how it should be calculated.

Based on the circumstances of this case, I find that prejudgment interest is warranted, but not for the time period before July 20, 2006, the date Frank filed his Complaint. Defendants improperly excluded Frank from Dragon Group from March 2003 to the present. The failure to initiate proceedings to resolve this issue before July 20, 2006, however, is largely attributable to Frank.[99] Moreover, during that time, Frank did not bear the investment risk in Dragon Group that Defendants did. Therefore, interest on the amounts due to Frank based on the November 8, 2005 distribution will not begin

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95 *Id.*

96 *Am. Gen. Corp. v. Cont'l Airlines Corp.*, 622 A.2d 1, 13 (Del. Ch. 1992) *aff'd*, 620 A.2d 856 (Del. 1992) (internal citations omitted).

97 *See Cede & Co. v. Technicolor, Inc.*, 684 A.2d 289, 301 (Del. 1996).

98 Am. Compl. 8; POB 8.

99 In my prior opinions in this case, I addressed in detail Frank's languor in commencing this action. *See Whittington v. Dragon Gp. L.L.C.*, 2010 WL 692584, at *7 (Del. Ch. Feb. 15, 2010); *Whittington v. Dragon Gp. L.L.C.*, 2009 WL 1743640, at *12 (Del. Ch. June 11, 2009).

to accrue until July 20, 2006. In addition, the rate of interest shall be the legal rate as prescribed in 6 *Del. C.* § 2301.[100] Furthermore, in the unique circumstances of this case, I find that all parties should bear the risk of interest rate fluctuations equally. Accordingly, I award prejudgment interest at the legal rate compounded monthly using the rate that would apply as of the first day of each month.

As to the possibility that there may have been other distributions and adjustments, and to take into account any contributions made by the Sibling Defendants for which Frank may have a similar obligation, such that additional monetary relief may be appropriate, I order that an accounting of the financial records of Dragon Group be performed promptly. Specifically, the parties shall arrange for an accounting to be performed of all contributions to Dragon Group by its members and all distributions to members since October 16, 2002. The accounting also should include a report on the current financial condition of Dragon Group. Frank shall be entitled to the full rights of a member with an 18.81% interest in Dragon Group.

III. CONCLUSION

For the reasons set forth in this Opinion, I hold that (1) Frank is a member of Dragon Group LLC with an interest equivalent to that of 146 shares out of a total of 776

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[100] *See Doft & Co. v. Travelocity.com Inc.*, 2004 WL 1152338, at *12 (Del. Ch. May 20, 2004) ("Since the petitioners have failed to develop a credible record on the issue, the court looks to the legal rate of interest."); *Chang's Hldgs, S.A. v. Universal Chems. & Coatings*, 1994 WL 681091, at *3 (Del. Ch. Nov. 22, 1994) ("The legal interest rate serves as a useful default rate when the parties have inadequately developed the record on the issue.").

shares or 18.81%; (2) Frank is entitled to a payment of $162,175.10 plus prejudgment interest as specified herein; and (3) Frank is entitled to an accounting to determine his proportionate share of any other distributions or contributions and the financial condition of Dragon Group. Any such distributions and contributions will be added to or set off against the amount due to Frank in the final judgment in this action.

Plaintiff's counsel shall prepare a proposed form of judgment or order reflecting these rulings, submit it to opposing counsel for comment, and file the proposed judgment or order within ten days of the date of this Opinion. The order shall include provisions for the appointment within thirty days of the date of this Opinion of an appropriate expert, acceptable to both parties, to perform the accounting. The Court anticipates that the accounting will be completed within no more than sixty days after the date of the expert's appointment and that a final judgment will be entered promptly thereafter.